

**Before the  
Federal Communications Commission  
Washington, D.C. 20554**

	)	CSR 8438-E
	)	CSR 8439-E
	)	CSR 8440-E
	)	CSR 8441-E
	)	CSR 8442-E
	)	CSR 8443-E
In the Matter of	)	CSR 8444-E
	)	CSR 8445-E
Bresnan Communications, LLC	)	CSR 8446-E
	)	CSR 8447-E
Petition for Determination of Effective	)	CSR 8448-E
Competition in Communities in Montana	)	CSR 8449-E
	)	CSR 8450-E
	)	CSR 8451-E
	)	CSR 8452-E
	)	CSR 8453-E
	)	CSR 8454-E
	)	CSR 8455-E

**MEMORANDUM OPINION AND ORDER**

**Adopted: April 21, 2011**

**Released: April 22, 2011**

By the Senior Deputy Chief, Policy Division, Media Bureau:

**I. INTRODUCTION AND BACKGROUND**

1. Bresnan Communications, LLC, hereinafter referred to as “Petitioner,” has filed with the Commission a petition pursuant to Sections 76.7, 76.905(b)(2) and 76.907 of the Commission’s rules for a determination that Petitioner is subject to effective competition in those communities listed on Attachment A and hereinafter referred to as the “Communities.” Petitioner alleges that its cable system serving the Communities is subject to effective competition pursuant to Section 623(l)(1)(B) of the Communications Act of 1934, as amended (“Communications Act”),<sup>1</sup> and the Commission’s implementing rules,<sup>2</sup> and is therefore exempt from cable rate regulation in the Communities because of the competing service provided by two direct broadcast satellite (“DBS”) providers, DIRECTV, Inc. (“DIRECTV”), and DISH Network (“DISH”) and, in Billings, Montana, USA Digital.<sup>3</sup> The petition is unopposed.

2. In the absence of a demonstration to the contrary, cable systems are presumed not to be subject to effective competition,<sup>4</sup> as that term is defined by Section 623(l) of the Communications Act and Section 76.905 of the Commission’s rules.<sup>5</sup> The cable operator bears the burden of rebutting the

<sup>1</sup> See 47 U.S.C. § 543(l)(1)(B).

<sup>2</sup> 47 C.F.R. § 76.905(b)(2).

<sup>3</sup> Bresnan states that its rates are not regulated in any of the Communities and that it is seeking formal exemption from the beginning of regulation under current conditions. Petition at 3 n.2.

<sup>4</sup> 47 C.F.R. § 76.906.

<sup>5</sup> See 47 U.S.C. § 543(l)(1); 47 C.F.R. § 76.905(b).

presumption that effective competition does not exist with evidence that effective competition is present within the relevant franchise area.<sup>6</sup> For the reasons set forth below, we grant the petition based on our finding that Petitioner is subject to effective competition in the Communities listed on Attachment A.

## II. DISCUSSION

3. Section 623(l)(1)(B) of the Communications Act provides that a cable operator is subject to effective competition if the franchise area is (a) served by at least two unaffiliated multi-channel video programming distributors (“MVPDs”), each of which offers comparable video programming to at least 50 percent of the households in the franchise area; and (b) the number of households subscribing to programming services offered by MVPDs other than the largest MVPD exceeds 15 percent of the households in the franchise area.<sup>7</sup> This test is referred to as the “competing provider” test.

4. The first prong of this test has three elements: the franchise area must be “served by” at least two unaffiliated MVPDs who offer “comparable programming” to at least “50 percent” of the households in the franchise area.<sup>8</sup> It is undisputed that the Communities are “served by” both DBS providers, DIRECTV and DISH, and that these two MVPD providers are unaffiliated with Petitioner or with each other. A franchise area is considered “served by” an MVPD if that MVPD’s service is both technically and actually available in the franchise area. DBS service is presumed to be technically available due to its nationwide satellite footprint, and presumed to be actually available if households in the franchise area are made reasonably aware of the service’s availability.<sup>9</sup> The Commission has held that a party may use evidence of penetration rates in the franchise area (the second prong of the competing provider test discussed below) coupled with the ubiquity of DBS services to show that consumers are reasonably aware of the availability of DBS service.<sup>10</sup> We further find that Petitioner has provided sufficient evidence of DBS advertising in local and other media that serve the Communities to support its assertion that potential customers in the Communities are reasonably aware that they may purchase the service of these MVPD providers.<sup>11</sup> The “comparable programming” element is met if a competing MVPD provider offers at least 12 channels of video programming, including at least one channel of nonbroadcast service programming<sup>12</sup> and is supported in this petition with copies of channel lineups for both DIRECTV and DISH.<sup>13</sup> Also undisputed is Petitioner’s assertion that both DIRECTV and DISH offer service to at least “50 percent” of the households in the Communities because of their national satellite footprint.<sup>14</sup> Accordingly, we find that the first prong of the competing provider test is satisfied.

5. The second prong of the competing provider test requires that the number of households subscribing to MVPDs, other than the largest MVPD, exceeds 15 percent of the households in a franchise area. Bresnan asserts that in some Communities it is the largest MVPD and in others one of the other MVPD providers is the largest and the combined household share of Bresnan and the other MVPDs

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<sup>6</sup> See 47 C.F.R. §§ 76.906-907(b).

<sup>7</sup> 47 U.S.C. § 543(l)(1)(B); see also 47 C.F.R. § 76.905(b)(2).

<sup>8</sup> 47 C.F.R. § 76.905(b)(2)(i).

<sup>9</sup> See Petition at 4.

<sup>10</sup> *Mediacom Illinois LLC*, 21 FCC Rcd 1175, 1176, ¶ 3 (2006).

<sup>11</sup> 47 C.F.R. § 76.905(e)(2).

<sup>12</sup> See 47 C.F.R. § 76.905(g). See also Petition at 7.

<sup>13</sup> See Petition at Exh. 4.

<sup>14</sup> See Petition at 4.

exceeds 15 percent.<sup>15</sup> The Commission has recognized that in those conditions, whichever MVPD is the largest, the remaining competitors have subscribership of over 15 percent.<sup>16</sup> Petitioner sought to determine the competing provider penetration in the Communities by purchasing a subscriber tracking report from the Satellite Broadcasting and Communications Association that identified the number of subscribers attributable to the DBS providers within the Communities on a zip code plus four basis.<sup>17</sup>

6. Based upon the aggregate DBS subscriber penetration levels that were calculated using Census 2000 household data,<sup>18</sup> as reflected in Attachment A, we find that Petitioner has demonstrated that the number of households subscribing to programming services offered by MVPDs, other than the largest MVPD, exceeds 15 percent of the households in the Communities. Therefore, the second prong of the competing provider test is satisfied for each of the Communities. Based on the foregoing, we conclude that Petitioner has submitted sufficient evidence demonstrating that both prongs of the competing provider test are satisfied and Petitioner is subject to effective competition in the Communities listed on Attachment A.

### III. ORDERING CLAUSES

7. Accordingly, **IT IS ORDERED** that the petition for a determination of effective competition filed in the captioned proceeding by Bresnan Communications, LLC, **IS GRANTED**.

8. **IT IS FURTHER ORDERED** that the certification to regulate basic cable service rates granted to any of the Communities set forth on Attachment A **IS REVOKED**.

9. This action is taken pursuant to delegated authority pursuant to Section 0.283 of the Commission's rules.<sup>19</sup>

FEDERAL COMMUNICATIONS COMMISSION

Steven A. Broecker  
Senior Deputy Chief, Policy Division, Media Bureau

<sup>15</sup> Petition at 8 & Exh. 1 (Declaration of Paul Jamieson, Managing Counsel, Legislative & Regulatory, Cablevision Systems Corp. (an affiliate of Bresnan), dated Feb. 9, 2011) at ¶ 4.

<sup>16</sup> If Bresnan is the largest MVPD, then MVPDs other than the largest one are the DBS providers, which have a combined share of over 15%. On the other hand, if one of the DBS providers is the largest MVPD, then Bresnan (which alone has over 15%) and the other DBS provider combined have over 15%. See, e.g., *Time Warner Cable Inc.*, 25 FCC Rcd 14422, 14424, ¶ 6 (2010); *Charter Commun.*, 21 FCC Rcd 1208, 1210, ¶ 5 (2006).

<sup>17</sup> Petition at 9. A zip code plus four analysis allocates DBS subscribers to a franchise area using zip code plus four information that generally reflects franchise area boundaries in a more accurate fashion than standard five digit zip code information.

<sup>18</sup> Petition at Exh. 6.

<sup>19</sup> 47 C.F.R. § 0.283.

## ATTACHMENT A

CSRs 8438-E, 8439-E, 8440-E, 8441-E, 8442-E, 8443-E, 8445-E, 8446-E, 8447-E, 8448-E, 8449-E,  
8450-E, 8451-E, 8452-E, 8453-E, 8454-E, 8455-E

## COMMUNITIES SERVED BY BRESNAN COMMUNICATIONS, LLC

Communities	CUIDs	CPR*	2000 Census Households	Estimated Competing Provider Subscribers
<b>8438-E</b>				
Anaconda-Deer Lodge	MT0042	28.56%	3995	1141
<b>8439-E</b>				
Belgrade City	MT0074	26.83%	2132	572
<b>8440-E</b>				
Billings	MT0009	15.37%	37525	5767
<b>8441-E</b>				
Cut Bank	MT0023	25.63%	1264	324
<b>8442-E</b>				
Kalispell	MT0025	17.47%	6142	1073
<b>8443-E</b>				
Stevensville	MT0094	61.50%	652	401
<b>8444-E</b>				
Townsend City	MT0124	51.65%	786	406
<b>8445-E</b>				
Walkerville	MT0052	19.87%	297	59
<b>8446-E</b>				
Beaverhead County	MT0046	36.73%	1906	700
Dillon	MT004	27.50%	1669	459
<b>8447-E</b>				
Columbia Falls	MT0014	24.14%	1400	338
Big Fork	MT0038	49.08%	652	320
Whitefish	MT0013	15.16%	2229	338
<b>8448-E</b>				
Black Eagle	MT0037	16.75%	418	70
Cascade County	MT0201	54.24%	6763	3668
<b>8449-E</b>				
Clancy CDP	MT0180	20.93%	540	113
Lewis and Clark County	MT0006	42.75%	10618	4538
Jefferson County	MT0182	44.68%	2798	1246

Communities	CUIDs	CPR*	2000 Census Households	Estimated DBS Subscribers
<b>8450-E</b>				
Livingston	MT0007	22.76%	3084	702
Park County	MT0050	48.85%	3607	1762
<b>8451-E</b>				
Havre	MT0043	17.91%	4015	719
Hill County	MT0075	15.19%	2377	361
<b>84352-E</b>				
Deer Lodge	MT0003	28.36%	1442	409
Powell County	MT0168	15.82%	980	155
<b>8453-E</b>				
Hamilton	MT0020	32.34%	1772	573
Ravalli County	MT0071 MT0152	67.45%	11447	7721
<b>8454-E</b>				
Ravalli County	MT0172	67.45%	11447	7721
Lolo	MT0064	36.37%	1218	443
Missoula County	MT0045 MT0073	42.74%	14298	6111
<b>8455-E</b>				
Polson	MT0017	28.92%	1739	503
Ronan	MT0098	38.2%	699	267

\* CPR = Percent of competitive DBS penetration rate.